99-9136

ORIGINAL

Supreme Court, U.S.
FILED
APR 12 2000
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

EARTHY DANIELS, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, Earthy Daniels, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, without prepayment of costs and to proceed in forma pauperis. The Office of the Federal Public Defender was appointed as counsel for Earthy Daniels in the trial court under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

* * *

This motion is brought under Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

DATED: April 12, 2000

GUY MICHAEL TANAKA
Deputy Federal Public Defender

99-9136

SUPREME COURT, U.S.
FILED
APR 1 . 2000
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

Earthy Daniels, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GUY MICHAEL TANAKA
Deputy Federal Public Defender
Counsel of Record
MARIA E. STRATTON
Federal Public Defender
321 East Second Street
Los Angeles, California 90012-4206
Telephone (213) 894-4140

Attorneys for the Petitioner

QUESTION PRESENTED

Under *Custis v. United States*, 511 U.S. 485 (1994), the defendant may not, at his federal sentencing proceeding, collaterally attack prior convictions (on grounds other than the denial of counsel) that are used to impose a fifteen-year mandatory minimum term under the Armed Career Criminal Act. This case presents the issue left open in *Custis*: whether the defendant may use federal habeas to reopen his federal sentence and challenge constitutionally infirm prior convictions that were used to enhance his sentence.

TABLE OF CONTENTS

Page

QUESTION PRESENTED I

OPINION BELOW 1

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

1. There Is a Direct Conflict Between the Circuits 4

2. The Issue Is Important 6

3. The Decision of the Ninth Circuit Is Wrong 7

CONCLUSION 8

TABLE OF AUTHORITIES

CASES **Page**

Arnold v. United States,
63 F.3d 708 (8th Cir. 1995) 5

Clawson v. United States,
52 F.3d 806 (9th Cir. 1995) 5

Custis v. United States,
511 U.S. 485 (1994) 3, 4, 5, 7

Gideon v. Wainwright,
372 U.S. 335 (1963) 3, 4, 5

Nichols v. United States,
511 U.S. 738 (1994) 7

Turner v. United States,
183 F.3d 474 (6th Cir. 1999) 5

United States v. Clark,
200 F.3d 358 (5th Cir. 2000) 4, 5, 7

United States v. Daniels,
195 F.3d 501 (9th Cir. 1999) 1, 4, 5

STATUTES, RULES AND REGULATIONS

18 U.S.C. § 922(g) 2

18 U.S.C. § 924 ..... 2, 4, 5, 6

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 5

28 U.S.C. § 2255 ..... 3, 5, 6

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Earthy Daniels petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 195 F.3d 501 (9th Cir. 1999). *See* App. 1-4.

JURISDICTION

The Ninth Circuit Court of Appeals issued its order denying the petition for rehearing on January 13, 2000. *See* App 5. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Armed Career Criminal Act of 1984 (ACCA) codified in relevant part at 18 U.S.C. § 924(e)(1) provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

STATEMENT OF THE CASE

This case involves a challenge under 28 U.S.C. § 2255 attacking the constitutionality of a prior state conviction used to enhance petitioner's federal sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e).

Mr. Daniels was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court found that because Mr. Daniel's

prior California state convictions triggered the application of the ACCA, he was subject to a mandatory minimum term of 15 years.

After the sentence was affirmed on appeal, Mr. Daniels filed a motion under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence, alleging that the two predicate state convictions used to enhance his sentence were obtained in violation of the United States Constitution. He alleged that both of the state convictions resulted from involuntary guilty pleas. The district court denied the motion without reaching the merits of petitioner's constitutional claims. Instead, the court found that this Court's decision in *Custis v. United States*, 511 U.S. 485 (1994) precluded collateral attacks on the predicate state conviction on any ground other than the denial of counsel.

In a published opinion, the Ninth Circuit affirmed the district court's denial of 28 U.S.C. § 2255 petition. *United States v. Daniels*, 195 F.3d 501 (9th Cir. 1999). The court held: "In a § 2255 proceeding, *Custis* bars 'federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a *Gideon*[1] claim.' *Id.* at 504 (citation omitted).

---

[1] *Gideon v. Wainwright*, 372 U.S. 335 (1963) (conviction obtained in absence of counsel violates Sixth Amendment).

REASONS FOR GRANTING THE WRIT

Did this court in *Custis* intend to preclude collateral attacks on expired state convictions where those convictions were obtained in violation of the Constitution and then used to enhance a federal sentence? The Ninth Circuit, in this case, says yes; the Fifth Circuit says no.[2] The conflict created by these decisions is intolerable on an issue that recurs so frequently that the Ninth Circuit characterized it as "quotidian." *Daniels*, 195 F.3d at 503. Moreover, the issue is important. Application of the ACCA to petitioner increased his minimum sentence by more than seven years, more than doubling his term. It results in like increases for others subject to its provisions. Thus, it is vitally important that this Court resolve the issue of whether the predicate felonies triggering application of the ACCA may be collaterally attacked. This case presents the perfect vehicle for resolving the conflict between the circuits.

1. There Is a Direct Conflict Between the Circuits

In *Custis*, this Court barred collateral attacks *at sentencing* (other than *Gideon* violations) of state convictions that formed the predicate for enhancement under the ACCA but left open the question of whether such attacks would be permitted on collateral review of the federal sentence.[3]

In *Clark*, the Fifth Circuit held that *Custis* did not preclude the defendant from collaterally attacking, by means of 28 U.S.C. § 2255 petition, the state court

---

[2] *United States v. Clark*, 200 F.3d 358 (5th Cir. 2000).

[3] *Custis* noted that the defendant could still attack his state court sentences in state court or through federal habeas review, and, if successful, could apply for reopening of any federal sentence enhanced by the state sentence. It expressed "no opinion on the appropriate disposition of such an application." 511 U.S. at 497.

convictions used to enhance his federal sentence. 203 F.3d at 370. *Clark* observed that although *Custis* expressed a preference for exhausting state court remedies and the federal habeas remedy under 28 U.S.C. § 2254 with respect to the prior convictions, it could not be read to preclude "initial resort to section 2255" where, because the defendant was no longer subject to custody under the state convictions, there was no other forum to challenge the constitutionally infirm prior. *Ibid.*

By contrast, the Ninth Circuit in this case has interpreted *Custis* to bar all federal habeas review of the validity of prior convictions (other than *Gideon* claims) used for federal sentencing enhancement. 195 F.3d at 504. The Ninth Circuit's opinion does not differentiate between state court convictions that are still subject to attack in state court or by 2254 petitions and state court convictions that are wholly expired and no longer subject to challenge. Indeed, the opinion appears to hold that even if a defendant succeeded in vacating the predicate conviction, federal habeas review is unavailable to challenge the enhanced federal sentence. It quoted its previous opinion in *Clawson v. United States*, 52 F.3d 806 (9th Cir. 1995) for the proposition that a 2255 motion did not lie even where the defendant claimed that state conviction used to enhance his sentence under the ACCA became nonfinal when the appeal was reopened and was unconstitutionally obtained, because *Custis* barred all collateral attacks. *Daniels*, 195 F.3d at 503.[4]

The Sixth Circuit in *Turner v. United States*, 183 F.3d 474 (6th Cir. 1999) has taken an intermediate position, holding that the defendant must first challenge his state convictions in state court or by a 2254 action. Only after such an action is

---

[4] This appears to be in accord with the position taken by the Eighth Circuit. *See Arnold v. United States*, 63 F.3d 708 (8th Cir. 1995)(defendant may not use a section 2255 motion to attack a prior state conviction used to enhance his federal sentence).

successful may he reopen his federal sentence.

Thus, there is no uniformity on the scope of federal review of constitutionally infirm state court convictions used to impose a fifteen-year mandatory minimum term under the ACCA. The Ninth Circuit bars all review other than *Gideon* claims; the Sixth Circuit allows review only where the predicate state court conviction has been overturned in an independent proceeding; and the Fifth Circuit allows review where there is no other forum to hear the claim. This Court should grant certiorari to resolve this irreconcilable conflict.

2. The Issue Is Important

If the district court finds that the ACCA applies, by virtue of a defendant's prior criminal convictions, it must impose a mandatory minimum term of fifteen years. In most cases, this dramatically increases the term that the defendant would otherwise be subject to under the Sentencing Guidelines. Yet, under the decision in this case, the defendant may not challenge that sentence even where the predicate prior was unconstitutionally obtained and the defendant can demonstrate that beyond doubt.

Moreover, the issue of whether a defendant may challenge an unconstitutional prior under section 2255 — where there is no other forum available — recurs frequently. A person, once sentenced to a minimum term of fifteen years, possess a much greater incentive to review expired state prior convictions than he possessed when the prior convictions were of no consequence. Thus, as the Ninth Circuit noted, the issue arises with great frequency, and this Court should grant certiorari to settle whether there is any remedy where one has received a sentence of at least fifteen years based on a prior conviction that was unconstitutionally obtained.

3. The Decision of the Ninth Circuit Is Wrong

The Fifth Circuit got it right; the Ninth Circuit has it wrong. *Custis* did not bar all collateral challenges to predicate state priors. *Custis* was careful to limit its holding to sentencing hearings and explicitly left open the availability of federal habeas review to challenge the constitutionality of the state prior conviction: the defendant could attack his "state sentences in Maryland **or** through federal habeas review." *Custis*, 511 U.S. at 497 (emphasis added). As the dissent emphasizes, the "Court's opinion makes clear that it uses the phrase 'collateral attack' to refer to an attack during sentencing." 551 U.S. at 498, n.1 (Souter, J., dissenting). Thus, *Custis* did "not disturb uniform appellate case law holding that an individual serving an enhanced sentence may invoke federal habeas to reduce the sentence to the extent that it was lengthened by a prior unconstitutional conviction." 551 U.S. at 512 (Souter, J., dissenting). And as the Fifth Circuit noted: "Justice Ginsburg, who concurred without reservation in *Custis*, has stated that '*Custis* presented a forum question. The issue was where, not whether, the defendant could attack a prior conviction for constitutional infirmity.' *Nichols v. United States*, 511 U.S. 738 (1994)(Ginsburg, J., dissenting)." *Clark*, 203 F.3d at 367.

That makes good sense. As a matter of fairness, there is no reason to forbid challenges to a federal sentence where the defendant can prove that the prior conviction used to increase that sentence is invalid under the constitution. Nothing in *Custis* suggests that this Court intended to insulate such an unconstitutional sentence for all future review, and this Court should grant certiorari to correct this dangerous and erroneous misreading of *Custis* by the Ninth Circuit in this case.

CONCLUSION

For the foregoing reasons, Earthy Daniels, respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

DATED: April 12, 2000

GUY MICHAEL TANAKA
Deputy Federal Public Defender
Counsel of Record

APPENDIX

under the circumstances there involved, where the litigation is between corporate entities, the failure to award costs to the prevailing party properly was considered an unjustified penalty. The appeal before us more closely involves the civil rights considerations set forth in *Stanley*.

While I concur in the majority's decision to remand for a determination of the proper costs, I assume that the majority agrees that in making its determination of the proper amount of costs, the district court in its discretion may consider whether there is a disparity of resources between the parties; the fact that this is civil rights litigation; the plaintiffs' partial success in securing modification of the CBest; the possibility that the cost award would render some or all of the plaintiffs indigent; the possibility that the cost award could chill future civil rights litigation, and any other appropriate factors.

Unlike the majority, however, I would allow the district court, in exercising its broad discretion, to award zero costs if the balance of factors so warrant. This result is supported by *Stanley*. In *Stanley*, this court found that the award of costs by the district court was an abuse of discretion because the district court had failed to consider all of the proper factors, namely the possibility that the cost award could render some or all of the plaintiffs indigent, or the possibility that the cost award could chill future civil rights litigation, and thus remanded the issue to the district court for reconsideration in light of those factors. If, on remand in this case, the district court properly considers the factors discussed above and then determines that given those factors, the appropriate cost award is zero, then under *Stanley*, I believe the district court would be acting within its discretion in awarding zero costs.

Federal Rule of Civil Procedure 54(d)(1) provides in part that "costs other than attorneys' fees shall be allowed as of course to the prevailing party *unless the court otherwise directs*; ..." (emphasis added). The district court's power in an appropriate case to "otherwise direct" is not limited. Yet, the majority engages in engrafting on the rule a requirement that "in no event may the court direct that no costs be awarded." While in some cases it would certainly be an abuse of discretion for a court to direct that no costs be awarded a prevailing party, we should not attempt to restrict the discretion granted the court so as to eliminate that possibility in all cases. Rule 54(d)(1) itself is broad enough to allow district court judges to deny all or a portion of the costs to the prevailing parties, and we should only interfere when they abuse their discretion. Because I disagree that in a civil rights case, a district court necessarily abuses its discretion when it denies all costs to a prevailing party, I respectfully dissent from that part of the majority's holding.

UNITED STATES of America, Plaintiff-Appellee,

v.

Earthy D. DANIELS, Jr., Defendant-Appellant.

No. 99-55097.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 30, 1999.

Decided Oct. 21, 1999.

Petitioner who was convicted of being a felon in possession of a firearm sought postconviction relief, challenging constitutionality of state convictions used in sentencing him under Armed Career Criminal Act (ACCA). The United States District Court for the Central District of California, William Matthew Byrne, Jr., J., denied relief, and petitioner appealed. The Court of Appeals, Fernandez, Circuit Judge, held that state convictions may not be collaterally attacked on motion to vacate, absent allegation that petitioner was denied right to counsel under *Gideon*.

Affirmed.

1. Criminal Law ⇐1139

Court of Appeals reviews de novo denial of petition to set aside, vacate, or correct federal sentence. 28 U.S.C.A. § 2255.

2. Criminal Law ⇐997.4

Petitioner who files motion to set aside, vacate, or correct federal sentence may not collaterally attack state convictions used to enhance petitioner's sentence under Armed Career Criminal Act (ACCA), unless that attack alleges denial of the right to counsel under *Gideon*. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. § 924(e); 28 U.S.C.A. § 2255.

Michael Tanaka, Deputy Federal Public Defender, Los Angeles, California, (argued); Carlton F. Gunn, Deputy Federal Public Defender, Los Angeles, California, for the defendant-appellant.

Daniel S. Goodman, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before: O'SCANNLAIN, FERNANDEZ, and T.G. NELSON, Circuit Judges.

FERNANDEZ, Circuit Judge:

Earthy D. Daniels, Jr., appeals the denial of his 28 U.S.C. § 2255 motion in which he sought to challenge the constitutionality of two state convictions, which were used in sentencing him under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA). We affirm.

BACKGROUND

Daniels was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court determined that Daniels, who had four prior convictions, was subject to the ACCA and sentenced him to imprisonment for 17 months. Daniels appealed to this court. He asserted that the district court's conclusion that his two California burglary convictions constituted predicate offenses under the ACCA was incorrect. In an unpublished disposition, we rejected this assertion. *See United States v. Daniels*, No. 95-50044, 86 F.3d 1164, 1996 WL 292231, at * 3-4 (9th Cir. June 3, 1996).

Daniels then filed a § 2255 motion to set aside, vacate or correct his federal sentence, and collaterally attacked his two California robbery convictions, which were also used to enhance his sentence. Although he claimed that he had been unconstitutionally convicted, he did not contend that he was denied the right to counsel as guaranteed by *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), in either case.

The district court denied his motion on the ground that he could not maintain this collateral attack under § 2255. He then appealed.

JURISDICTION AND STANDARD OF REVIEW

[1] We have jurisdiction pursuant to 28 U.S.C. § 2253(a). We review denials of petitions under 28 U.S.C. § 2255 *de novo*. *See Sanchez v. United States*, 50 F.3d 1448, 1451 (9th Cir.1995).

DISCUSSION

[2] In *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994), the Supreme Court declared that

BEST AVAILABLE COPY

except for *Gideon*[1] challenges, a defendant may not collaterally attack prior state convictions in sentencing proceedings where the ACCA is being used to enhance the sentence. The statute does not permit it. *See id.* at 490, 114 S.Ct. at 1735. The Constitution does not require it. *See id.* at 497, 114 S.Ct. at 1739. Concomitantly, ease of administration and the interest in finality argue against it. *See id.* at 496–97, 114 S.Ct. at 1738–39.

We have recognized the force of the *Custis* reasoning and have, therefore, expressly determined that it applies to sentencing proceedings in general. *See, e.g., United States v. Ricardo*, 78 F.3d 1411, 1415 (9th Cir.1996); *United States v. Price*, 51 F.3d 175, 177 (9th Cir.1995); *United States v. Alexander*, 48 F.3d 1477, 1494–95 (9th Cir.1995); *United States v. Burrows*, 36 F.3d 875, 885 (9th Cir.1994). In the same vein, we have decided that, on other than *Gideon* grounds, a defendant may not collaterally challenge a state conviction through the medium of a motion seeking dismissal of his indictment. *See United States v. Zarate-Martinez*, 133 F.3d 1194, 1199–1200 (9th Cir.), *cert. denied*, — U.S. —, —, 119 S.Ct. 123, 142 L.Ed.2d 99 (1998).

But, says Daniels, we have not yet decided that collateral attacks on state convictions cannot be brought under § 2255. If he were correct, we would doubt that they could be brought. Among other things, a § 2255 petition asserts that there was some error at sentencing, which must be corrected, and we know from *Custis* that there could not have been any error whatsoever. As it is, Daniels is not correct.

In *Clawson v. United States*, 52 F.3d 906 (9th Cir.1995), a defendant brought a § 2255 motion and asserted that his federal sentence under the ACCA "was improperly enhanced through use of a state conviction that later became nonfinal when his appeal from the state judgment was reopened, *and* was unconstitutionally obtained." *Id.* at 907 (emphasis added). We responded:

> We hold that there is no finality requirement in the version of the ACCA under which Clawson was sentenced, *and* that under *Custis*, there is no constitutional right to collaterally attack the validity of a state conviction in a federal sentencing hearing on any basis other than denial of the right to counsel....

Id. (emphasis added). If that were not clear enough, we returned to the topic in a case which, though not a § 2255 matter, called upon us to expatiate on *Clawson*. We explained that, in *Clawson*, "[w]e read *Custis* to bar federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a *Gideon* claim." *Contreras v. Schiltgen*, 151 F.3d 906, 907 (9th Cir.1998).

We believe that we have spoken with a good deal of clarity, but because Daniels does not find it so, perhaps others are of the same mind as he. We hesitate to leave uncertainty hovering about an issue that is so quotidian. Therefore, we restate our position here.[2]

CONCLUSION

We return to the § 2255 locale in order to clear away any bosk that still obscures our position regarding collateral attacks on prior convictions.

1. *See Gideon*, 372 U.S. at 342–45, 83 S.Ct. at 795–97.

2. Incidentally, Daniels's invocation of our decision in *Brock v. Weston*, 31 F.3d 887, 889–91 (9th Cir.1994), does not alter the result. That case dealt with a 28 U.S.C. § 2254 petition, which can be a vehicle for challenging state convictions in proper circumstances. *See id.* at 890–91 & nn. 6 & 7; *see also Allen v. Oregon*, 153 F.3d 1046, 1049–50 (9th Cir. 1998); *Gretzler v. Stewart*, 112 F.3d 992, 1004–05 (9th Cir.1997), *cert. denied*, 522 U.S. 1081, 118 S.Ct. 865, 139 L.Ed.2d 763 (1998); *Price*, 51 F.3d at 177. It is not relevant to this proceeding.

In § 2255 proceedings, *Custis* bars "federal habeas review of the validity of a prior conviction used for federal sentencing enhancement unless the petitioner raises a *Gideon* claim." *Contreras*, 151 F.3d at 907.

AFFIRMED.

Gilberto SEBASTIAN-SEBASTIAN, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 97-71045.

United States Court of Appeals, Ninth Circuit.

Submitted Dec. 11, 1998.[1]

Filed Oct. 25, 1999.

Alien, a native and citizen of Guatemala, petitioned for review of decision of Board of Immigration Appeals (BIA) denying asylum. The Court of Appeals, Wiggins, Circuit Judge, held that Court of Appeals was required to defer to BIA's implied finding that alien did not testify credibly regarding whether his persecution by guerillas was on account of an implied political opinion.

Petition denied.

Wiggins, Circuit Judge, concurred and filed opinion.

Brunetti, Circuit Judge, specially concurred and filed opinion.

Pregerson, Circuit Judge, dissented and filed opinion.

1. The panel unanimously finds this case suitable for decision without oral argument. Fed. R.App. P. 34(a)(2).

1. Aliens ⇐54(5), 54.3(4)

Board of Immigration Appeals (BIA) made implied finding that alien's testimony was not credible when it found that alien's persecution by Guatemalan guerillas was not due to implied political opinion based on his brother's military service, and thus Court of Appeals was required to defer to such decision and deny asylum (Per curiam opinion of Wiggins, Circuit Judge, and opinion of Brunetti, Circuit Judge, concurring in result). Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A).

2. Aliens ⇐54.3(4)

Under the substantial evidence standard applicable to review of a decision of the Board of Immigration Appeals (BIA) denying asylum, a petitioner contending that the BIA's findings are erroneous must establish that the evidence not only supports that conclusion, but compels it. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A).

3. Aliens ⇐53.10(3)

An asylum applicant can establish a political opinion, as required to demonstrate asylum eligibility based on persecution on account of a political opinion, by means of an imputed political opinion. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A).

Christopher J. Stender, Stender & Larkin, Phoenix, Arizona, for the petitioner.

Regina Byrd, Office of Immigration Litigation, United States Department of Justice, Washington, D.C., for the respondent.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 13 2000

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	)	No. 99-55097
	)	
Plaintiff-Appellee,	)	D.C. No. CV-98-00420-WMB
	)	
v.	)	ORDER DENYING PETITION
	)	FOR REHEARING AND
EARTHY D. DANIELS, JR.,	)	SUGGESTION FOR REHEARING
	)	EN BANC
Defendant-Appellant.	)	
	)	

Before: O'SCANNLAIN, FERNANDEZ, and T.G. NELSON, Circuit Judges

The panel has unanimously voted to deny the appellant's petition for rehearing. The suggestion for rehearing en banc was circulated to the judges of this court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

EARTHY DANIELS, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

CERTIFICATE OF SERVICE

I, Guy Michael Tanaka, hereby certify that on this 12th day of April, 2000, a copy of Motion for Leave to Proceed in Forma Pauperis, Affidavit and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were

//

//

mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, counsel for the Respondent.

Respectfully Submitted,

DATED: April 12, 2000

GUY MICHAEL TANAKA
Deputy Federal Public Defender

MARIA STRATTON
Federal Public Defender
321 East Second Street
Los Angeles, California 90012-4206
Telephone No. (213) 894-4140

Attorneys for Petitioner
Earthy Daniels